FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 87

ORSEL McGHEE and MINNIE S. McGHEE, his wife,
Petitioners,

—against—

BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A. COON and ADDIE A. COON, ET AL.,
Respondents.

BRIEF OF THE HUMAN RELATIONS COMMISSION OF THE PROTESTANT COUNCIL OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE PETITIONERS.

ROBERT McC. MARSH,
EUGENE BLANC, JR.,
Counsel for The Human Relations Commission of the Protestant Council of the City of New York, *amicus curiae*.

ALPERT PRESS, BROOKLYN, N. Y., TEL. TRIANGLE 5-1058-1059

INDEX.

Table of Contents.

Table of Authorities Cited.

ARTICLES.

STATUTES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 87

ORSEL McGHEE and MINNIE S. McGHEE, his wife,
Petitioners,

—against—

BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A. COON and ADDIE A. COON, ET AL.,
Respondents.

BRIEF OF THE HUMAN RELATIONS COMMISSION OF THE PROTESTANT COUNCIL OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE PETITIONERS.

OPINION BELOW.

The opinion of the Supreme Court of the State of Michigan appears in the Record (R. 60-69) and is reported at 316 Mich. 614.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237b of the Judicial Code (28 U. S. C. 344b).

The date of the judgment of the Supreme Court of the State of Michigan is January 7th, 1947 (R. 70), and petitioners' motion for a rehearing was denied on March 3rd, 1947 (R. 80). A petition for certiorari was duly presented to this Court on May 10th, 1947 and was granted by this Court on June 23rd, 1947 (R. 81).

FACTS.

This brief is filed on behalf of The Human Relations Commission of the Protestant Council of the City of New York because of the obvious importance of the questions of social and individual welfare involved in the decision which will affect large segments of urban populations.

The facts are adequately stated in petitioners' brief, to which reference is respectfully made.

SUMMARY OF ARGUMENT.

I. The courts may not be used to destroy rights which are protected against infringement or deprivation by the constitutional guaranties of due process and equal protection of the laws.

II. In the light of present knowledge of the admixture of races, the restriction to persons of the "Caucasion race" has become so indefinite in meaning that its judicial enforcement violates the due process and equal protection clauses of the Fourteenth Amendment.

III. The question of whether the judicial enforcement of the racial restrictive covenant deprives petitioners of constitutionally guaranteed rights is a substantial federal question properly presented by the present record.

IV. Only the independent judgment of this Court can finally decide whether the enforcement of the discriminatory racial covenant by a state court violates the Fourteenth Amendment.

ARGUMENT.

POINT I.

THE COURTS MAY NOT BE USED TO DESTROY RIGHTS WHICH ARE PROTECTED AGAINST INFRINGEMENT OR DEPRIVATION BY THE CONSTITUTIONAL GUARANTIES OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

No state may, through its legislature, restrict the use or occupancy of land on the basis of race, without violating the Fourteenth Amendment.

Buchanan v. *Warley*, 245 U. S. 60;
Harmon v. *Tyler*, 273 U. S. 668;
City of Richmond v. *Deane*, 281 U. S. 704.

Moreover, the protection of the Fourteenth Amendment against infringement by a state extends to judicial as well as legislative action.

Ex parte Virginia, 100 U. S. 339, 346-347;
Chicago, Burlington & Quincy Railroad Co. v. *Chicago*, 166 U. S. 226;
Twining v. *New Jersey*, 211 U. S. 78, 90-91.

The racial restrictive covenant is not self-executing; it can be enforced only by judicial action, i.e., by a court which is a part of the government of the state. While a court has no concern with the private agreements of buyers and sellers, and can neither dictate the terms of a sale nor question the

voluntary observance of restrictions in a conveyance (*McGovney: Racial Residential Segregation by State Court Enforcement of Restrictive Agreements*, 33 Cal. Law Rev. 5, 20-21 [1945]), nevertheless constitutional limitations become relevant when one party seeks the aid of the state in the enforcement of the covenant against an unwilling occupant of the property. When the state acts, then it becomes the concern of this Court to decide whether the provisions of the Fourteenth Amendment have been violated. From this point of view, it is immaterial whether the state acts through its legislative, judicial, or executive branch, and the significant question is whether the action of the state, in whatever form exercised, deprives a citizen of rights protected by the Constitution.

The petitioners in this case are not parties to the covenant. Therefore, they have not as a matter of contract, waived any constitutional rights any more than a purchaser who merely takes title subject to an existing mortgage without any express assumption thereof, can be said to have contracted to be bound by its terms or to have waived the right to contest the validity of the mortgage or any other encumbrances upon the property.

It is indisputable that the occupation of property is a property right within the meaning of the Fourteenth Amendment, and equally indisputable that the defendants have been deprived of that right by the judgment appealed from solely because of their race and color. The judgment is therefore clearly unconstitutional because of its denial of both due process and the equal protection of the laws.

Buchanan v. *Warley, supra.*

In the present case the state's judicial action has in effect sanctioned the selection of a particular race for oppressive treatment, and the singling out of individuals of that race who are innocent of any offense.

In *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, the question as stated by the Chief Justice, was whether

the Railway Labor Act which made one organization the exclusive bargaining representative of a class, imposed a correlative duty "to represent all the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation." The Supreme Court of Alabama had dismissed a complaint asking for injunctive relief against a bargaining agreement which discriminated against Negroes. This Court reversed, saying at page 198:

> "If, as the state court has held, the Act confers this power on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights."

And also at page 202:

> "We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. *J. I. Case Co.* v. *Labor Board, supra,* 335, but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for

whom it acts, without hostile discrimination against them."

Following this decision, a Circuit Court recently enjoined enforcement of a covenant in a collective bargaining contract which in fact, although not in terms, discriminated against Negroes.

Brotherhood of Locomotive Firemen and Enginemen v. *Tunstall*, 163 F. (2d) 289 (C. C. A. 4th, 1947).

Moreover, Section 1978 of the Revised Statutes, 8 U. S. C. A. 42, provides that "all citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

This section includes rights which are protected by the Fourteenth Amendment.

Hague v. *C. I. O.*, 307 U. S. 496.

Like the bargaining representatives in the *Steele* case, courts are, in the present case, the exclusive agencies for the enforcement of the rights and duties arising out of the restrictive covenant. The Civil Rights Act, like the Railway Labor Act, thus imposes upon the courts, and other agencies of government, a duty not to enforce covenants which are unenforceable except by court action, and which when so enforced have the effect of directly violating the statute. Just as the Railway Labor Act was said to have made the bargaining agent in effect a legislature, and thus impliedly imposed the constitutional limitations against discrimination, so the decree now under review has the same effect as a legislative discrimination, and hence, both impliedly, and because of the Civil Rights Act, the constitutional limitations apply to its action.

POINT II.

IN THE LIGHT OF PRESENT KNOWLEDGE OF THE ADMIXTURE OF RACES, THE RESTRICTION TO PERSONS OF THE "CAUCASIAN RACE" HAS BECOME SO INDEFINITE IN MEANING THAT ITS JUDICIAL ENFORCEMENT VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

The covenant in suit restricts the occupation of the property to "those of the Caucasion race." As a matter of common knowledge, the great melting pot which is the source and pride of the genius of America makes it impossible for any one now to say *with certainty* that he is "of the Caucasian race." The highest point of this fallacy of racial purity was reached in Nazi Germany's "Aryan" concept, and exploded in a way that leaves civilization still trembling and scientists more than ever convinced that there is now no such thing as a pure racial strain, whether that be denominated Aryan or Caucasian, Jew, White, or Negro. The testimony in this case (R. pp. 27-30) is clearly and definitely to this effect, and to the effect that it is now no longer possible to determine positively and finally, with respect to every individual, whether or not he is exclusively Caucasian. Admixture of races over the centuries has completely broken down the purity and exclusiveness of the assumed original strains, so that the determination of the racial derivative is a matter of delicate and subtle measurement, within the competence of trained experts only. The apparent color is not now a determinative index.

Since complete demonstration of absolute Caucasian purity is not scientifically practicable, it follows that if the covenant means only pure Caucasian, it is entirely lacking in content, and if it means less than pure, it is obvious that there is nothing from which a court may determine the degree of purity which was intended. The record in this case illustrates precisely this difficulty, for the testimony (R. p.

22) is to the effect that one of the petitioners (Mrs. McGhee) "appears to be the mulatto type" (R. p. 23). This means that she had an admixture of white, i.e. Caucasian, blood, but to an unknown (and no doubt unascertainable) degree. Since the restrictive covenant, on the testimony in this case, can have no meaning as applied to only one hundred per cent pure Caucasians, and must mean something less, then has petitioner come within it? Clearly, the covenant is so uncertain that this question cannot be answered by any court, and is certainly not answered on this record. Assuming occupancy by persons apparently white, but later shown to have a small admixture of Negro blood, would the covenant apply on the theory that the "Caucasian" status had been forfeited? And what percentage of Negro blood would the covenant tolerate before an equity court would be asked to act? Is the protagonist in Sinclair Lewis' novel, *Kingsblood Royal*, a member of the Caucasian race? It cannot be said that apparent color alone is the deciding test, because there also are gradations (R. p. 30, fol. 49) which the covenant does not attempt to define, and if that were the test, the covenant would exclude dark Caucasoids and light or white Negroids (R. p. 29).

In *Clayton* v. *Ramsden* (1943), 1 All E. R. 16, 168 Law Times Reports 113, the House of Lords had before it the question of the validity of a condition subsequent in a devise of real estate to the effect that if a devisee "should contract a marriage with a person who is not of Jewish parentage and of the Jewish faith," the devise should be ineffective. Lord Romer adopted the argument that the racial description had become so indefinite because of the admixture of races that it was impossible to determine what was meant, and therefore the covenant was void for uncertainty. He said:

> "What, then, did the testator mean by the stipulation that the daughter's husband was to be of Jewish race or descent? It cannot reasonably be supposed that the husband was to show an unbroken line of

descent from the patriarch Jacob. If the daughter were compelled to wait for such a husband she would remain a spinster all her life and the condition would be void as amounting to a total restraint on marriage. It seems far more probable that the testator meant no more than that the husband should be of Hebraic blood. But what degree of Hebraic blood would a permissible husband have to possess? Would it be sufficient if one only of his parents were of Hebraic blood? If not, would it be sufficient if both were? If not, would it be sufficient if in addition it were shown that one grandparent was of Hebraic blood or must it be shown that this was true of all his grandparents? Or must the husband trace his Hebraic blood still further back? These are questions to which no answer has been furnished by the testator. It was therefore impossible for the court to see from the beginning precisely or distinctly upon the happening of what event it was that Mrs. Clayton's vested interests under the will were to determine, and the condition is void for uncertainty."

In *Re Blaiberg-Blaiberg and Public Trustee* v. *De Andia Yrarrazaval*, 162 Law Times Reports 418 (1940), Ch. 385, a similar forfeiture clause was considered by the High Court of Justice, Chancery Division. The court held that a description by reference to a faith or a race was too indefinite for enforcement by a court. We submit that for the purpose of testing its enforceability against the barrier of due process the term "Caucasian" has likewise become too indefinite and uncertain.

What really has happened is that the increase in scientific anthropological knowledge and the inexorable process of dilution, over the centuries, of so-called pure racial strains has so diminished the content of the racial restrictive covenant and of the term "Caucasian" as used therein, that the residue which is left is insufficiently definite to call into play the machinery of a court of equity. The law is not insensitive to such changes in scientific concepts, nor is it so inflexible that it must slavishly follow, in an equitable action,

precedents decided when the state of general or scientific knowledge gave apparent certainty to the terms used in a restrictive covenant. There can be no more striking example of Mr. Justice Holmes' famous sentence: "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

In analogous situations, indefinite classifications established by state legislatures and permitting of arbitrary state action have been recognized as raising constitutional questions of due process and equal protection despite the state's own judicial approval of the legislative distinctions.

Skinner v. *Oklahoma*, 316 U. S. 535.

In that case the Oklahoma statute for the sterilization of certain criminals, and the exemption of others from sterilization, was held to violate the equal protection clause, and, by the concurring opinions, to violate also the due process clause. The basis of decision was that a line of demarcation had been established by the state which had no "significance in eugenics" and which thus permitted a court to find one individual to be on one side of the line or the other for arbitrary reasons. The Court (per Douglas, *J.*) said:

> "* * * strict scrutiny of the classification which a State makes in a sterilization law is essential, lest, unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of equal protection of the laws is a pledge of the protection of equal laws.' *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369. When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."
>
> (316 U. S. *supra*, at p. 541.)

The inherent unsoundness of attempting to identify specific individuals as members of racial groups necessarily defined in general and inexact terms, is illustrated by *In re Drummond Wren* (1945), 4 Dom. L. Rep. 674, Ont. Rep. (1945) 778, Ont. Wkly. Notes (1945) 795, in which a covenant against ownership of land by "Jews or other persons of objectionable nationality" was stricken down. In that case, the action was brought under the Conveyancing and Law of Property Act of Canada to have declared invalid the restrictive covenant just mentioned. One argument accepted by the Court was that the covenant was void for uncertainty, the Court saying:

> "Counsel for the applicant contended before me that the restrictive covenant here in question is void for uncertainty. So far as the words 'persons of objectionable nationality' are concerned, the contention admits of no contradiction. The conveyancer who used these words surely must have realized, if he had given the matter any thought, that no Court could conceivably find legal meaning in such vagueness. So far as the first branch of the covenant is concerned, that prohibiting the sale of the land to 'Jews', I am bound by the recent decision of the House of Lords in *Clayton* v. *Ramsden* (1943), 1 All E. R. 16; to hold that the covenant is in this respect also void for uncertainty; and I may add, that I would so hold even if the matter were *res integra*. The Law Lords in *Clayton* v. *Ramsden* were unanimous in holding that the phrase 'of Jewish parentage' was uncertain, and Lord Romer was of the same opinion in regard to the phrase 'of Jewish faith'. I do not see that the bare term 'Jews' admits of any more certainty."

Accordingly it should be held that in the light of present scientific anthropological knowledge the racial restrictive covenant is so devoid of precise and definite meaning that its enforcement by an agency of the government would violate the constitutional limitations imposed by the due process and equal protection clauses.

POINT III.

THE QUESTION OF WHETHER THE JUDICIAL ENFORCEMENT OF THE RACIAL RESTRICTIVE COVENANT DEPRIVES PETITIONERS OF CONSTITUTIONALLY GUARANTEED RIGHTS IS A SUBSTANTIAL FEDERAL QUESTION PROPERLY PRESENTED BY THE PRESENT RECORD.

Attempts at racial discrimination by whatever means have consistently been regarded as raising substantial federal questions requiring the application of constitutional tests.

> *Yick Wo* v. *Hopkins*, 118 U. S. 356 (local ordinance);
> *Missouri ex rel Gaines* v. *Canada*, 305 U. S. 337 (state statutes);
> *Steele* v. *Louisville & Nashville Railroad Co.*, *supra* (collective bargaining agreements).

And conversely, state legislation affirmatively carrying out the policy of nondiscrimination so often announced by this Court, likewise raises a substantial federal question, but one to which the answer must be that such legislation is consonant with, and does not transgress, the Fourteenth Amendment.

> *Railway Mail Association* v. *Corsi*, 326 U. S. 88 (upholding New York Civil Rights Law § 43).

As the Negro population increases in number, concentration and importance, and becomes more widely distributed geographically, all the evils so vividly described in petitioners' brief (pp. 47-84) become cumulatively worse and increasingly matters of national concern. As Professor Dodd has said, there is a basis for increasingly greater federal concern "in changed economic and social conditions * * * which make national problems which were once local." (American Political Science Review, Feb., 1947, Vol. XLI

No. 1 at p. 4.). The tremendous social and economic forces set in play throughout the country by the judicial enforcement of the restrictive covenant are the background against which the question must be projected.

The actual harm done to the Negro by the covenant, the restrictions on his normal living, the cumulative effect on his ability to earn a living and to be free from other forms of racial segregation, the denial of his right to buy and use property which a willing seller is ready to sell to him—all these wrongs to a large number of citizens throughout the nation present a federal question of the greatest importance. When they are caused and aggravated by the action of a governmental agency which alone can enforce the covenant, they become the proper subject of action by this Court, and demand constitutional condemnation.

See Mr. Justice Murphy, concurring in *Steele* v. *Louisville & Nashville Railroad Co.*, *supra*, at page 208.

Corrigan v. *Buckley*, 271 U. S. 323, does not stand in the way of this conclusion. The analysis of this case in the brief of the petitioners, at pages 42-46, and similar analyses in the briefs of the petitioners in the related cases which are being heard together, sufficiently demonstrate this point, and no detailed repetition of those analyses is required here.

The important distinction to be noted is that *Corrigan* v. *Buckley* reached the Supreme Court on appeal (not on writ of certiorari) and it was held that the contention that the decrees of the courts below violated the Fifth and Fourteenth Amendments "cannot serve as a jurisdictional basis for the appeal," and that the contention, "if of a substantial character," was not raised below and hence unavailable on the appeal.

In this case, however, the very question now to be decided, arising on a writ of certiorari, was adequately raised in all the lower courts, and presents the substantial constitutional question of whether the *state's* enforcement of the restrictive covenant through the machinery of its courts, sheriffs and, if necessary, jails and jailers, violates the due process clause

and the equal protection clause of the Fourteenth Amendment.

It is true that zoning ordinances and restrictions against uses such as stables, factories and distilleries have been upheld, but with ample justification in some aspect of the police power, asserted for the public welfare.

Village of Euclid v. *Ambler Realty Co.*, 272 U. S. 365;
Cowell v. *Springs Company*, 100 U. S. 55;
Reinman v. *Little Rock*, 237 U. S. 171.

Obviously, however, decisions upholding restrictions of this nature on the use of real property regardless of the race of the occupant, are not applicable to covenants restricting the occupation of the land on racial grounds regardless of the use to which the land is put.

This distinction has been argued at length in petitioners' brief at pages 15-18.

POINT IV.

ONLY THE INDEPENDENT JUDGMENT OF THIS COURT CAN FINALLY DECIDE WHETHER THE ENFORCEMENT OF THE DISCRIMINATORY RACIAL COVENANT BY A STATE COURT VIOLATES THE FOURTEENTH AMENDMENT.

The Supreme Court of Michigan has determined as a matter of its local law that the discriminatory racial covenant may be enforced by the State of Michigan. The question for this Court is not as to the correctness of this decision under local law, for on that question *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64 (1937), would make the state law the final authority.

The true question is whether enforcement by the state violates the constitutional guaranties of due process and equal protection. On this question, this Court, and this

Court alone, is the final arbiter, no matter what the decision of the state court. As long ago as 1885, this Court, for the purpose of deciding the constitutional question, rejected the construction which a state court had put on local ordinances used to discriminate against Chinese, and, while admitting that the opinion of the state court should be accepted on matters of state concern alone, declared the principle to be otherwise in connection with questions arising under the federal Constitution. The Court said:

> "That, however, does not preclude this court from putting upon the ordinances of the supervisors of the county and city of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge."
>
> *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366.

Applying this principle to a decision of the Supreme Court of California, which had sanctioned administrative discriminations against the operation of laundries by Chinese, the Court continued:

> "The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution."
>
> *Yick Wo* v. *Hopkins*, *supra*, at page 374.

In other words (to paraphrase the language of Mr. Justice Field, dissenting, in *Baltimore & Ohio Railroad Company* v.

Baugh, 149 U. S. 368, 401), notwithstanding what interpretation may have been put upon the covenant by a state court, and notwithstanding how many times the machinery of a state court has been called into play for its enforcement, "there stands as a perpetual protest against its repetition the Constitution of the United States."

CONCLUSION.

THE JUDGMENT OF THE SUPREME COURT OF MICHIGAN SHOULD BE REVERSED.

Respectfully submitted,

ROBERT McC. MARSH,
EUGENE BLANC, JR.,
Counsel for The Human Relations Commission of the Protestant Council of the City of New York, *amicus curiae*.